



Billing Code 4333–15

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–HQ–NAL–2016–N002]

[FXGO1660091NALO156FF09D02000]

Native American Policy for the U.S. Fish and Wildlife Service

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability of final policy.

SUMMARY: We, the Fish and Wildlife Service (Service or FWS), announce that we have established a new Native American policy, which will replace the 1994 policy at 510 FW 1 in the Fish and Wildlife Service Manual. The purpose of the policy is to carry out the United States’ trust responsibility to Indian tribes by establishing a framework on which to base our continued interactions with federally recognized tribes and Alaska Native Corporations. The policy recognizes the sovereignty of federally recognized tribes; states that the Service will work on a government-to-government basis with tribal

governments; and includes guidance on co-management, access to and use of cultural resources, capacity development, law enforcement, and education.

DATES: The policy is effective as of January 20, 2016.

ADDRESSES: The Native American policy is available in the Fish and Wildlife Service Manual at <http://www.fws.gov/policy/510fw1.html>.

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SUPPLEMENTARY INFORMATION: This Native American policy is available at <http://www.fws.gov/policy/510fw1.html>, which is within part 510 of the Fish and Wildlife Service Manual, the part titled “Working with Native American Tribes.” The purpose of the policy is to articulate principles and serve as a framework for government-to-government relationships and interactions between the Service and federally recognized tribes to conserve fish and wildlife and protect cultural resources. The policy includes guidance on:

- The relationship between the Service and federally recognized tribes and Alaska Native Claims Settlement Act (ANC) corporations,
- Service employee responsibilities,
- Government-to-government consultation and relations,

- Communication,
- Co-management and collaborative management,
- Tribal access to Service lands and Service-managed resources for cultural and religious practices,
- Tribal cultural use of plants and animals,
- Law enforcement,
- Training and education,
- Capacity building and funding, and
- Guidance for implementing and monitoring the policy.

This policy is not meant to stand on its own. To effectively implement this policy, the Service will update its *U.S. Fish and Wildlife Service Tribal Consultation Handbook*, establish an Alaska Regional Native American policy, and develop training so that Service employees will be better able to perform duties related to this policy.

Overview of the Policy

We recognize that when the Service and tribes work together on resource matters, our longstanding relationship is strengthened and resources are better served. This policy provides guidance on recognition of tribal sovereign status, Service responsibilities, and opportunities for the Service and tribes to work together toward natural and cultural resource conservation and access. The purpose of this policy is to provide Service employees with guidance when working with tribes and ANCs.

Section 1 of this policy recognizes the unique relationship that Federal governmental agencies have with federally recognized tribes and the U.S. Government's

trust responsibility toward those tribes. It explains that while this is a nationwide policy, the Service maintains flexibility for Service Regions and programs to work more specifically with the tribes and ANCs in their Regions.

Section 2 recognizes tribes' sovereign authority over their members and territory, the tribes' rights to self-govern, and that government-to-government communication may occur at various levels within the Service and the tribes.

Section 3 describes communication, consultation, and information sharing among the Service, tribes, and ANCs.

Section 4 sets out a range of collaborative management and co-management opportunities where tribes, Alaska Native Organizations (ANO), the Service, and others have shared responsibility.

Section 5 recognizes that, for meaningful cultural and religious practices, tribal members may need to access Service lands and to use plants and animals for which the Service has management responsibility.

Section 6 recognizes tribal law enforcement responsibilities for managing Indian lands and tribal resources and encourages cooperative law enforcement between the Service and tribes.

Section 7 invites tribal governments to work with the Service to develop and present training for Service employees. It also makes available Service technical experts to help tribes develop technical expertise, supports tribal self-determination, encourages cross-training of Service and tribal personnel, and supports Native American professional development.

Section 8 establishes monitoring and implementation guidance for the policy.

Section 9 describes the policy's scope and limitations.

Exhibit 1 includes the definitions of terms we use in the policy.

Exhibit 2 describes the responsibilities of employees at all levels of the Service to carry out this policy.

Exhibit 3 lists the authorities under which the Service is able to take the actions we describe in the policy.

Background and Development of this Policy

On June 28, 1994, the Service first enacted its Native American Policy to guide our government-to-government relations with federally recognized tribal governments in conserving fish and wildlife resources and to “help accomplish its mission and concurrently to participate in fulfilling the Federal Government’s and Department of the Interior’s trust responsibilities to assist Native Americans in protecting, conserving, and utilizing their reserved, treaty guaranteed, or statutorily identified trust assets.”

In July 2013, the Service convened a Native American Policy Team (team) to review and update the policy. The team is comprised of Service representatives from the Regions and programs. We also invited all federally recognized tribal governments across the United States to nominate representatives to serve on the team. A total of 16 self-nominated tribal representatives from all of the major Regions across the country joined the team to provide input and tribal perspective.

Although Service and tribal team members took part in writing the draft, full agreement was not possible on every issue and some differences remain. Understanding

those issues, tribal representatives continued to participate in an effort to improve the policy.

In November 2014, the Service invited federally recognized tribal governments in each of its Regions and ANCs to consult on a government-to-government basis. The Service provided an early working draft of the updated policy for their review and input. A total of 23 of the tribal representatives submitted written comments to further develop and refine the draft updated policy.

From December 2014 to April 2015, the Service held 24 consultation meetings and webinars within the Regions and nationally. Representatives from approximately 100 tribes attended these meetings. In March 2015, the Service revised the working draft of the updated policy and distributed it for internal Service review throughout all levels, Regions, and programs within the agency. We incorporated feedback from the internal Service review and additional comments received from tribal governments into a draft that we published in the **Federal Register**.

Summary of Comments and Changes to the Final Policy

On August 3, 2015, we announced the availability of a draft of this policy in a **Federal Register** notice (80 FR 46043) and requested public comments by September 2, 2015. The Service reopened the comment period for an additional 30 days in a **Federal Register** document published on September 21, 2015 (80 FR 57014). The second comment period closed on October 21, 2015.

We received approximately 34 comment letters on the draft policy. The comments were from Federal and State government agencies, tribes, ANCs, nongovernmental

organizations, and individuals. Most of the comments addressed specific elements, while some comments were more general. We considered all of the information and recommendations for improvement included in the comments and made appropriate changes to the draft policy. We also made some additions and clarifications to the policy that were not addressed in the public comments, but were discovered through internal briefings and reviews during the policy revision period. The following summarizes our responses to public comments received.

Many of these topics are related to one another, and it is sometimes difficult to categorize each into one discrete area of the policy that it addresses. We have grouped similar comments together to help readers understand our rationale.

Many commenters were pleased with many aspects of the new policy. Several commenters noted that the policy was “clearly the product of a careful and deliberative effort to involve tribes’ input and integrate their concerns.” Several commenters noted that the Native American Policy Team that worked for 2½ years on this policy was formed at the earliest stages of policy consideration and consisted of tribal members and Service employees who worked very closely together on all aspects of the policy. One specific commenter stated that tribes and ANCs “applaud[ed] FWS for its extensive efforts working with representatives from tribes across the country to put together this new policy.”

Tribes and ANCs commented that FWS’s recognition of the importance of sharing the traditional knowledge, experience, and perspectives of Native Americans will ultimately lead to better management of shared fish, wildlife, and cultural resources.

Tribes and ANCs supported the Service's recognition of the need for flexibility to allow for regional diversity. Tribes stated that they appreciate that the Service did not group them together with other stakeholders, but instead treats them as sovereign governments. Tribes appreciate that the Service took tribal comments from a pre-public comment period and incorporated them into the published draft. Several commenters commended the Service for incorporating the table of responsibilities, which describes specific responsibilities for Service employees.

Commenters support the promotion of cultural competency awareness within the Service. Likewise, they support that the draft policy makes a clear and honest reference to Service limitations with respect to protecting sensitive tribal information from public release (e.g., via Freedom of Information Act (FOIA) requests).

ANCs stated that they support and appreciate the Service's inclusion and acknowledgement of ANCs as significant stakeholders that require policies guiding and encouraging the Service's interaction with them.

The following categorizes comments by policy section, followed by comments on the content of the three exhibits, and finally those comments received specific to Alaska.

General Comments

1. As a "consultation policy" this has shortcomings. *Response:* This is not a "consultation policy." Consultation is a part of this policy, which covers more than consultation.

2. The draft policy repeatedly uses multiple qualifiers in the text such as, "to the extent practicable," "not inconsistent with essential Service functions," "as necessary or

appropriate," and "as resources and priorities allow." The repeated use of these qualifiers appears to vest discretion in the individual Service official or staffer as to whether or not, at any given point, consultation will occur. *Response:* This is not meant to undermine the Service's responsibility to consult with tribes and ANCs. The Service understands the importance of and our responsibility for working with tribes. However, we cannot promise more than we can deliver. The Service must act within the authorities Congress has given us, and we can only perform as much work as the resources supplied by Congress will allow.

Section 1. Introduction

1. Some commenters objected to the qualifier that this policy applies to those whose official duties may affect tribal interests, and not to all employees. *Response:* While most employees have responsibilities that may affect tribes, some employees may have completely unrelated jobs, such as employee payroll or janitorial services for Service properties. Even so, the Service will try to deliver some degree of tribal training to all employees through regular internal Service training. The Service will ensure that all employees will be aware of their responsibilities under this policy.

2. The Service should show how tribal input was considered and incorporated into final decisions. *Response:* Implementation will include Regional teams that are better able to communicate with the tribes in their area. There is no one-size-fits-all for all Service programs. Many times, tribes are present throughout the process and will have ongoing dialogue concerning how their comments have been included in decisionmaking.

Section 2. Sovereignty and Government-to-Government Relations

1. This section of the policy should be first. In the existing 1994 policy, sovereignty is the very first principle. In this revised draft, it is relegated to subheading 5. The placement of this guiding principle diminishes what was once highlighted. *Response:* We have moved this section up from section 5 to section 2 and have moved what were preceding sections into exhibits.

2. The policy needs to make clear that the Service cannot make decisions or take actions that impact or diminish treaty-reserved rights of tribes and incorporate the principles that serve as the foundation for Secretary's Order 3206. *Response:* In section 3, the policy states that communication with tribes will begin early in the planning process. We will continue to develop relationships and communicate with tribes at the appropriate levels.

3. The Service should implement a consensus-based process with the tribes to identify treaty and trust obligations and to develop programs and actions to meet those obligations. *Response:* The Service looks for opportunities to consult and collaborate with tribes as is stated throughout the policy. We understand that the tribal consultation process goes beyond the requirements of public involvement. We discuss this in section 4.

4. The policy should support development and implementation of agreements with tribes or regional tribal groups to reflect needs tailored to capabilities. *Response:* The Service will form Regional tribal-Service implementation teams to collaboratively address issues that arise on a more local level.

5. We received several comments relating to the fact that some Indian tribes have delegated a portion of their authority to inter-tribal agencies. Commenters stated that the Service should acknowledge that delegation and, if allowed by that delegation, provide those agencies with relevant technical and policy-related information. They also stated that the Service should develop cooperative relationships with those agencies to carry out the programmatic goals of the Service and to better serve Indian tribes. Other commenters raised concerns that the Service should be aware that each tribe in an inter-tribal agency may not have delegated full authority on an issue. Another commenter explained that tribal consortia provide a powerful opportunity for the Service to "get the word out" to affected tribes. *Response:* Tribes have delegated varying ranges of authority to inter-tribal organizations acting for them. The policy cannot address each specific delegation, and so we address this issue in section 2 as follows: "We will consult with inter-tribal organizations to the degree that tribes have authorized such an organization to consult on the tribe's behalf." During implementation, we plan to reach out to these groups and the tribes whom they represent when forming regional implementation teams. The Service will continue to engage consortia to contact tribes, get the word out, and become involved in other programs.

6. Several commenters asked that we revise language to limit this section to where there are "federally recognized tribal rights." *Response:* We have not adopted this comment. The Service exercises due care where our actions affect the exercise of tribal rights.

Section 3. Communications and Relationships

1. Substitute “strive to the greatest extent possible to incorporate” instead of “consider” traditional knowledge. *Response:* The language in the policy clearly states that the Service will “consider” traditional knowledge, which means that we will take it seriously and truly consider the traditional knowledge shared.

2. Several commenters raised concern that tribal members may not be free to share information on specific cultural locations, practices, or actions that could be useful to the Service, and asked the Service to accommodate that privacy. *Response:* We understand there may be limitations on tribal members’ abilities to share information with us. They may not be able to share any information, or they may be able to share information only if we keep that information confidential. The Service respects that tribes, ANCs, or tribal members may not be able to share information that could be disclosed to the public if required by FOIA. As the policy states, we will work collaboratively to protect confidential information and protect disclosure when possible. If the Service relies on any such information as a basis for agency action to protect resources, however, that information will become an agency record subject to FOIA and must be released unless it falls under an exemption. This potential disclosure must be balanced with the fact that if we are unaware of this information, we cannot use it as a basis to protect those cultural resources or practices.

3. One commenter shared that certain tribes require consultation to occur on those tribes’ reservations, and that the Service should state that they will consult with each tribe according to those requirements. In addition, many tribes require a two-tiered process where technical staff discuss management issues and elevate policy discussions to formal government-to-government consultation when necessary. *Response:* The

Service understands that each tribe may have its own requirements and standards for interacting with Federal agencies at both the government-to-government level and on technical issues. In developing relationships with tribes in their areas, Service employees will better understand and appropriately meet with tribal governments. The table of responsibilities in Exhibit 2 anticipates coordination at all levels.

4. One commenter stated that to ensure that the Service is engaging with ANCs and tribes in a meaningful way that fulfills its consultation obligations, we should establish firm guidelines for what actions the agency will take when preparing for a consultation, including information on how much notice we must give tribes and ANCs before a consultation occurs, what information is provided to these groups in advance of consultation, and how the Service will incorporate comments gathered at consultations into the official record and decisionmaking process. *Response:* While this policy discusses a wide range of consultation and engagement possibilities, how to carry out proper consultation is beyond its scope. The “how to” is covered in the *U.S. Fish and Wildlife Service Tribal Consultation Handbook* and will be a topic of ongoing training.

5. If the Service is to request full cooperation and assistance regarding shared information, the final draft must include strong language to protect tribal information, Traditional Ecological Knowledge (TEK), site-specific information, and any information deemed sensitive by the tribes, as being totally protected and not subject to FOIA requests. *Response:* The Service will coordinate with tribes individually on this issue. We strive to balance our responsibility to the American public to release all information on which we base our decisions with respect for tribal concerns about keeping information confidential. While we will work with tribes to help protect sensitive cultural

information, as a Federal agency, the Service is subject to the FOIA and has no discretion to protect from disclosure tribal information that does not qualify under any of FOIA's statutory exemptions.

6. We received many comments voicing concerns about treaty rights. One commenter believed that the language in the policy gives excessive discretion to Service staff to limit the exercise of treaty rights. *Response:* Throughout the policy, we recognize tribal treaty rights. Where treaty rights exist, employees do not have the discretion to allow or disallow their exercise. Where there are disagreements as to interpretation of how far those treaty rights reach, the Service will communicate with the affected tribe or tribes, but we must continue to carry out our activities as required by law.

7. Other commenters, while recognizing that not all tribes have treaty rights, were concerned that the policy does not specifically support the rights of tribal members to use fish and wildlife resources on Service lands. *Response:* There are numerous statements about recognition of tribal treaty rights in the policy. Where treaty rights exist that extend to Service lands, such as fishing rights, those are recognized in the policy.

Section 4. Resource Management

1. The Service should assist and facilitate tribal participation in co-management venues where there are areas of jurisdictional overlap amongst multiple government interests. *Response:* Where the Service is involved in resource management, we will engage all of the governmental parties involved. There are areas where the Service might not have such authority, particularly where States manage wildlife, so we may not have resources involved in such a jurisdiction.

2. Several commenters asked us to add language stating that tribes are the primary natural resource managers on Indian lands, and that tribes are co-managers for shared resources off-reservation for treaty-reserved resources. *Response:* The first part of this statement goes beyond the scope of this policy. The second part of this statement is too broad a concept and does not apply in all situations, so we did not include it as part of the policy.

3. Several commenters stated that the 1994 policy had stronger language in certain areas, in particular about our participation in fulfilling the Federal Government's and the Department of the Interior's trust responsibilities to assist Native Americans in protecting, conserving, and using tribal reserved, treaty-guaranteed, or statutorily identified trust assets. *Response:* We revised the language of the first and fifth paragraphs in section 1 to address these concerns.

4. Several commenters discussed reserved rights on non-reservation lands. Some stated that the policy should reflect that various Indian tribes enjoy reserved rights on non-reservation lands, which allows those tribes to harvest natural resources pursuant to tribal law. One stated that the draft policy should reflect the obligation that the Service has, when considering actions affecting those lands and their natural resources, to meaningfully involve affected Indian tribes and their delegated inter-tribal agencies, where applicable. Other commenters asked for language clarifying that tribal members who are exercising tribal reserved rights have access to Service-managed or controlled lands for fishing and harvesting resources pursuant to tribal law or a memorandum of agreement between the tribe and Service. *Response:* Section 2 states that we will exercise due care where our actions affect the exercise of tribal rights. We work on a government-

to-government basis to address issues concerning management of tribal trust resources and Indian tribal treaty and other rights. In addition, where a tribe has developed an agreement with the Service, the tribe can carry out these activities in accordance with the agreement. Not all Service lands are open to all such uses.

5. One commenter stated that the policy needs to include stronger language regarding the use of tribal partners in assuming direct management over Service lands near reservations or where they have a significant interest on the landscape. *Response:* Congress has not given us the authority to give tribes management authority over Service lands. Management of Service lands is an inherently Federal function.

6. Several commenters voiced concern that tribes should not bear a disproportionate burden for the conservation of species, and to consider whether conservation measures on non-tribal lands and regulating non-Indian activities can achieve those goals. In addition, they stated that the policy needs to reinforce the principle message of Secretary's Order 3206 and clearly place the burden of proof on the Service to demonstrate a designation of critical habitat is required within a reservation. *Response:* The Service acts as required by the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 et seq.), and Secretary's Order 3206. We added language from our ESA section 4(b)(2) policy to this policy as follows: "We will always consider exclusions of tribal lands under section 4(b)(2) of the ESA before finalizing a designation of critical habitat. We will also give great weight to tribal concerns in analyzing the benefits of exclusion."

7. One commenter requested a stronger statement in the policy requiring that system directors, managers, and staff accommodate requests by tribes to access system

lands in a manner consistent with other members of the public or State governments. For example, if a particular refuge permits State big game hunts, then tribes should be able to access those same lands for hunting purposes. *Response:* This is too broad of a request to address in the policy. In short, not all tribes have treaty-reserved hunting and gathering rights. In certain geographic areas, tribes retain those treaty rights, but the rights might not extend to carrying out those activities on a refuge. We will work with tribes in the geographic area where hunting is authorized on a refuge.

8. One commenter was concerned that the administration of various wildlife laws cuts against the tribes, like the administration of Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) for furbearing mammals, where the Service requires a tribe to meet an unrealistic standard before it can continue its traditional practices of making cultural use of harvested animals. The resource management section needs to make it clear to Service employees that it expects its employees to treat tribes with respect and equity when they are making decisions about gathering of subsistence foods and natural resources. *Response:* The policy stresses respect and coordination with tribes. Issues surrounding native rights to hunt and gather on non-Indian lands vary. These issues will be addressed in training. In addition, we will have an Alaska policy to address subsistence issues in Alaska.

9. We received comments stating that while the policy talks about management and conservation of resources, it does not clearly reflect tribal “use” of resources. *Response:* We had addressed this in many places in the draft policy, including in the opening paragraph, in statements about Alaska subsistence uses, in the section on using cultural resources, and in the definition of “Fish and wildlife and cultural resource

management.” To address this comment, we have added “use” of resources in two additional places—in the definitions of co-management and collaborative management.

10. Several commenters stated that the policy must consider other governmental jurisdiction and interests, especially where litigation or laws recognize States as the primary managers of the resources, especially on ceded territories. *Response:* With respect to developing agreements to manage and conserve resources, we added a reference to “States and other co-managers.” The policy also recognizes State jurisdiction under both the Indian lands and non-Indian lands subsections of section 4.

11. Some commenters believed that the Service’s role in managing non-Indian lands is limited to federally owned lands, and then only where such uses have been established by Federal law or adjudication. *Response:* The Service’s jurisdiction goes beyond federally owned non-Indian lands, particularly when the Service manages ESA-listed species, eagles, and other migratory birds. Further, tribal rights need not have been formally adjudicated to be valid; therefore, we have not altered this language in the policy.

12. Several commenters asked that we clarify “where there is a legal basis for such use” when talking about tribal members using fish and wildlife resources on non-Indian lands. *Response:* Clarifying this term would require a very lengthy section that would, at a minimum, include reviewing treaties, statutes, and case law from around the country, which goes beyond the scope of this policy.

13. Commenters noted that the language in the Non-Indian Lands section might allow Service employees to participate in matters that are strictly between States and tribes. *Response:* We have added the phrase, “and where Service jurisdiction is involved”

to this paragraph. In addition, the definition of fish and wildlife resources encompasses only those that the Service is responsible for managing and conserving.

14. Commenters asked that we clarify the role the Service would play if there are disagreements between tribal governments and State or local resource management agencies. *Response:* Section 4 states, “certain tribal governments and State governments may have shared responsibilities to co-manage fish and wildlife resources. In such cases, we will consult and collaborate with tribal governments and affected State or local resource management agencies to help meet the objectives of all parties while honoring the Federal trust responsibility.”

Section 5. Culture/Religion

1. Some commenters found it offensive that the Service would prioritize scientific investigation over a tribe’s religious, ceremonial, or cultural needs. *Response:* In 1975, Interior Secretary Morton recognized Indians’ “legitimate interest in expressing their cultural and religious way of life, and at the same time, share the responsibility to conserve wildlife resources including federally protected birds.” The Attorney General’s 2012 policy tiers from the Morton policy and recognizes that the tribes and the United States share an interest in and responsibility for protecting wildlife resources: “It is a federal priority to prosecute those who violate federal laws by engaging in commercial activities involving federally protected birds, bird feathers, and remains. ... The Department of Justice is committed to robust enforcement of federal laws protecting birds while respecting tribal interests in the use of eagle feathers and other federally protected

birds, bird feathers, and other bird parts for cultural and religious purposes” (Attorney General Holder policy, October 12, 2012).

2. Several commenters asked that the policy include use of natural resources within the section on cultural resources. *Response:* While tribal members may not distinguish between natural and cultural resources, the Service follows a separate set of laws in each area. We address use of natural resources in section 4.

3. One commenter stated that tribes need to be provided timely notification when any actions are proposed on their ancestral homelands, so that they can make early, informed decisions on when and how to become involved. *Response:* The policy states, “The Service will meaningfully involve tribal governments in our actions when we or the tribal government determine the actions may affect their cultural or religious interest...”

4. Several commenters pointed out that while many instances of the words “may” and “should” were strengthened from an earlier draft of the policy, a few remaining “shoulds” could still be strengthened to make them absolute requirements. *Response:* Where the Service is able to state that it will act, it so stated. We do not, however, want to make representations that we are unable to perform.

5. One commenter asked that we delete “expression” and replace it with “practices” when talking about religion. *Response:* Based on respectful discussion within the tribal-Service policy team, we have kept the term “expression.”

Section 6. Law Enforcement

1. Several commenters wrote asking for support for formal agreements, such as cross-deputation. *Response:* We have explained that the Service will work with tribes to

the limits of the law. At this time, however, Federal law does not allow the Service to cross-deputize tribal officers.

2. Some commenters stated that they were concerned that Service officers should not assume that State or Federal law applies to Indian tribal members without first consulting the Indian tribes that may have jurisdiction in a particular area. In cases where Service officers determine that there have been possible violations committed by Indian tribal members, those officers should immediately contact tribal law enforcement to determine whether the members' tribe has jurisdiction. *Response:* In cases where Service officers determine that there have been possible violations of Federal law committed by tribal members, officers have a responsibility to investigate such violations. Service law enforcement officers are trained on the topics of Federal, State, and tribal jurisdictions. In situations where a question of tribal rights arises in the course of an investigation, the Service has a review process in place to determine whether or not to pursue a case. Service law enforcement officers are committed to working cooperatively with tribal game-enforcement authorities whenever they can in pursuing specific investigations. We also have added language in section 6 that the Service will provide its law enforcement staff additional cross-cultural training.

Section 7. Tribal Capacity Building, Assistance, and Funding

1. Several commenters asked that the Service commit to helping tribes receive a consistent level of funding to sustain ongoing tribal wildlife management projects. Several also asked that we make educating tribal staff an affirmative priority. *Response:* The Service funds tribal wildlife projects through several funding mechanisms. We do

not, however, have the resources to commit to set levels of funding. The Service is able to act only within the constraints of its available resources.

2. Several commenters focused on training for tribal members by asking the Service to facilitate training opportunities, promote its training facilities (e.g., at the National Conservation Training Center (NCTC)), and provide scholarships and funding to assist in the development of staff in areas of need. In addition, several commenters were concerned with language that stated that the Service would carry out certain functions, such as providing technical assistance, “as resources and priorities allow.” These commenters believe that these activities are a priority and were concerned that they not be left to the discretion of individual offices. *Response:* The Service offers many kinds of training in many locations. We include tribal members in many of our training courses, including those at NCTC. We cannot make representations that we can fund all desired activities that we may not have the resources to support.

3. Commenters encouraged the Service to provide joint training to increase awareness and understanding for implementation of the policy for tribal and Service staff to ensure they both receive consistent information and to foster collaborative learning and strong working relationships. *Response:* We agree. We have added language to section 8 that we will form both national and Regional tribal-Service teams to assess the priorities for training and other priorities in each area. Also, we have added language to section 8 as follows: “The Service will encourage and support joint training with tribes to promote common understanding about implementing the policy within the context of Region-specific circumstances.” Section 7 states: “The Service will provide tribal governments and their staff access to our fish and wildlife resource training programs in the same

manner that we provide access to other government agencies. In addition, we plan to work with tribes to develop, conduct, and attend joint training programs to increase awareness and sensitivity and to cross-train our employees and tribal staff on each other's responsibilities for resource stewardship.”

4. One commenter asked that the Service re-evaluate the Tribal Wildlife Grant (TWG) funding program and explore other options for providing stable, long-term funding to tribes like the Service currently provides to States. *Response:* Re-evaluating such programs goes beyond the scope of this policy.

5. Several commenters asked for stronger language regarding recruitment of Native Americans. *Response:* Both sections 6 and 7 address this issue. The policy encourages qualified Native Americans to apply for Service jobs. It additionally states that, “[w]e will collaborate with tribal governments to recruit Native Americans for Service law enforcement positions...”

6. We received many comments about the Indian Self-Determination and Education Assistance Act (ISDEAA; 25 U.S.C. 450 et seq.) and how it applies to the Service.

One commenter stated that the Service should first come out with a national policy regarding annual funding agreements (AFA) at national wildlife refuges before entering into any ISDEAA contracts at refuges. *Response:* That is beyond the scope of this policy.

Other commenters stated that multi-year funding agreements for refuge management are not statutorily authorized, and that 15 U.S.C. 458cc does not authorize multi-year funding agreements. *Response:* The Service will consider the full range of

contracts and grants that are available to tribes within applicable law. Multi-year agreements do not authorize multi-year funding. Funding is allocated through AFAs. Title 25 of the Code of Federal Regulations (CFR) at § 100.146 allows an agency to negotiate a self-governance funding agreement with a performance period that exceeds 1 year.

Another commenter stated that they believed that all information about AFAs should be made available under FOIA requests. Should there be an AFA, the Service must maintain records that it will be able to produce upon public request. *Response:* All documents in the Service's custody and control are subject to FOIA. Tribes are not subject to FOIA.

One commenter stated that refuge management should not be available to tribes under an AFA where the Service has not finalized a Comprehensive Conservation Plan (CCP), and that the Service cannot contract inherently Federal functions. *Response:* Refuge management has been identified as an inherently Federal function and is not available to tribes under an AFA.

7. Under the subsection on Professional Development, include a commitment to implement and expand tribal internship opportunities and programs for Native American students at colleges, universities, tribal colleges, and other institutions to provide expanded opportunities for Native American students to gain experience in wildlife resource management. *Response:* At this time, making this additional commitment in response to this request goes beyond the scope of the Service's resources.

8. Add language committing the Service to strategize with tribes about possible funding opportunities that would be available through statutory amendments to existing

programs. *Response:* The Service is not authorized to pursue statutory amendments on behalf of tribes.

9. Several commenters asked that the policy clarify that when offering assistance to tribes, the Service should limit its offer of expertise to the fish and wildlife resources defined by the policy. These commenters stated that the Service may not be qualified to review and assess tribal conservation measures for species under State jurisdiction without State involvement. Also, where there are instances of court-established processes for developing species management plans, Service involvement might be inappropriate.

Response: We added the following language: “Service involvement may be limited where litigation or other court actions have established a specific process for the development of species management plans and tribal codes.”

Section 8. Implementation and Monitoring

1. Several commenters hoped to see operational plans within the policy. They stated that the policy should contain more detail and directly address how it will be implemented. They stated that the policy seems to be a framework that needs to be transformed into operational plans for local level implementation. *Response:* The policy becomes operational through the table of employee responsibilities. In addition, the Service has a tribal consultation handbook that we will be updating. We added additional language to section 8 calling for national and Regional teams comprised of both Service and tribal representatives to implement the policy in a way that is meaningful at a more localized level. The policy also calls for training at all levels of the Service.

2. Commenters recommended that the Service establish a tribal committee that would monitor and evaluate the effectiveness of the policy and make recommendations to improve its implementation. Commenters asked that we require Regional and field offices to carry out training for staff and leadership on the culture and legal rights of Indian tribes in their areas, with invitations extended to those Indian tribes and tribal agencies to assist in the planning and execution of those trainings. *Response:* We have added language to section 8 that describes how we will form both national and Regional tribal-Service teams to assess the priorities for training and other priorities in each area. We have also added the following language to section 8: “The Service will encourage and support joint training with tribes to promote common understanding about implementing the policy within the context of Region-specific circumstances.” Implementation will continue through tribal-Service teams that will address training and other needs in each area. These teams will nurture strong collaborative working relationships that will address communication, training, implementation, and monitoring.

3. One commenter stated that there should be a clear process for recourse if tribal consultation is denied or mishandled by Service officials and staff. *Response:* Section 8 addresses the manner by which the Service will address disagreements regarding the implementation of this policy.

Section 9. Scope and Limitations

Several commenters were concerned that some of the language from the 1994 policy that clarified State wildlife agencies’ roles and authorities was missing from the draft. *Response:* We have recognized State authority throughout the policy and have

added the following, “Nothing in this policy may be construed as affecting the authority, jurisdiction, or responsibility of States to manage, control, or regulate fish and resident wildlife under State law or regulations.”

Exhibit 1. Definitions

1. Several commenters stated that the definition for “Indian lands” should include land held in fee by an Indian or a tribe, or land owned by an ANC. *Response:* The tribal-U.S. relationship is a political one. We cannot extend the legal protections of trust land to non-trust land through this policy. For ANCs, we plan to develop an Alaska regional policy that addresses the issue further.

2. Several commenters asked that we include a definition of “trust responsibility.” *Response:* We have taken language describing the contours of the trust responsibility from Secretary’s Order 3335 and inserted it into the first section of the policy.

3. Several commenters pointed out that in Alaska, co-management can take place between the Service and non-governmental entities, and that our proposed co-management definition did not include these situations. Other commenters asked that we make the definition more restrictive by including entities that have authority “legally established by federal law or adjudication.” *Response:* We have changed the definition of “co-management” as follows: “two or more entities, each having legally established management responsibilities, working collaboratively to achieve mutually agreed upon, compatible objectives to protect, conserve, use, enhance, or restore natural and cultural resources.” We have also added a definition for “collaborative management” as follows:

“two or more entities working together to actively protect, conserve, use, enhance, or restore natural and cultural resources.” We believe these clarifications will cover management scenarios both in Alaska and throughout the country.

4. Several commenters asked for clarity in the definition of fish and wildlife resources, stating that many fish and wildlife species found on refuges are managed under State rather than Federal authority. These commenters recommended that we state that the Service’s responsibility is limited to the purpose for which the refuge was designated and to federally managed species. *Response:* The Service has responsibility for all resources within refuge boundaries. We enter into agreements with States and other entities for co-management and cooperative management, where appropriate.

5. Many commenters objected to the definition of “sacred site” and offered alternative definitions. One commenter asked that we use the term “sacred place” and offered a definition. Another commenter stated that it would be more appropriate to use a definition they offered for “cultural landscapes,” which the National Park Service had used. *Response:* We understand that this definition may not fit tribal concepts of sacred sites. We will address these concerns during training. We continue to use this definition, which we took directly from Executive Order 13007 and the Departmental Manual at 512 DM 3. Concern about accessing cultural sites is further discussed in section 8 under the Access for Cultural, Archeological, and Historic Resources, and Indian Sacred Sites subsection.

6. One commenter stated that it was unclear whether the “sacred site” definition would require a prior identification of sacred sites. *Response:* We have clarified the language, changing the tense to clarify that that a tribe does not need to identify a sacred

site prior to the inception of the project under discussion. The tribe does need to identify the site to us in order for us to consider its sensitivity in our planning or review of the project. While a sacred site may exist to a tribe, we cannot consider a sacred site that we do not know about. In addition to the definition, the subsection on access addresses the need to avoid adversely affecting the physical integrity of sacred sites and to accommodate Indians' access to and use of sacred sites.

Exhibit 2. Responsibilities

1. Some commenters recommended moving this section farther back in the document, perhaps including it as an appendix to highlight the importance of the policy rather than the roles of various Federal positions. *Response:* We agree and have moved the table into an exhibit. The use of exhibits is consistent with other Service Manual policies.

2. Several commenters asked that the policy identify the Service officials who have responsibility to liaison with non-tribal governments, agencies, or other entities. *Response:* This policy is focused on working with Native Americans, so this request is beyond its scope.

Exhibit 3. Authorities

1. Many commenters asked that we list each treaty in which the United States and tribes have recognized reserved rights to natural resources. Some commenters noted that we mention treaties quite a bit, without recognizing that many tribes do not have treaties. Some commenters asked that we include particular statutes through which

Congress has stated the United States' legal relationship with tribes. *Response:* We are unable to add references to all the treaties and statutes that refer to individual tribes. They are too numerous to list in this document. Many tribes have several treaties or statutes, or both, with some overturning or modifying earlier citations. Individual treaties and statutes are more appropriately addressed through training at the local level.

2. Several commenters recommended we include the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.) to the authorities section. *Response:* We have added the Fish and Wildlife Coordination Act.

3. The authorities section should include the Memorandum of Understanding (MOU) among the U.S. Department of Defense, U.S. Department of the Interior, U.S. Department of Agriculture, U.S. Department of Energy, and the Advisory Council on Historic Preservation Regarding Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites, December 6, 2012. *Response:* We have added this MOU to the exhibit.

Alaska-specific Concerns

1. We received several comments that focused on concerns specific to Alaska. Many commenters stated that while ANCs are not tribal governments and are not treated as sovereigns, the United States has a responsibility to consult with ANCs on the same basis as Indian tribes under Executive Order 13175. They recommended that we include the Consolidated Appropriations Act of 2004 (Pub. L. 108–199) in the authorities section. In addition, several commenters noted that, while the Service has stated that it will adopt an Alaska regional policy, the national policy must also address the Service's relationship

with ANCs. Commenters pointed out that many national level proposals and plans have a substantial and direct impact on ANCs and other Alaska Native entities, so ANCs should be considered on the national level. *Response:* We have adopted these comments. We have added authorities about consultation with ANCs to the authorities exhibit. We have included the requirement to consult with ANCs in sections 1 and 3 of the policy. In addition, the Alaska Region (Region 7) is in the process of drafting an Alaska-specific policy. Also in response to these comments, we have added a definition of Alaska Native Corporation to the definitions exhibit.

2. Commenters from Alaska voiced concern that because the term "inter-tribal organization" is undefined, this provision might be interpreted as a limit on the agency's ability to consult with any group that is not a tribe or authorized by a tribe to consult on its behalf. *Response:* We have broadened the scope of "Alaska Native Organization (ANO)" to include a broad array of organizations that represent Alaska Natives, including, but not limited to, ANOs under the Marine Mammal Protection Act.

3. Commenters asked that the training and professional development opportunities anticipated by the Service for tribal governments should be extended to ANCs. Some stated that ANCs are valuable sources of traditional knowledge, have significant interests in receiving technical information, and asked that these policy provisions be expanded to include them. *Response:* We will consult with ANCs on the same basis as we consult with tribes, and we will also work with ANCs in all areas permissible by law.

4. Some commenters believe that under ISDEAA, ANCs have the same status as tribes for the provision of many contract services. *Response:* ANCs are entitled to

contract under title I of the ISDEAA. With respect to title IV self-governance funding agreements, 25 U.S.C. 458bb establishes that tribes are eligible to participate in the Department's Tribal Self-Governance Program. The regulations for the Program also allow consortia, defined as "an organization of Indian tribes that is authorized by those tribes to participate in self-governance."

Dated: January 20, 2016.

Daniel M. Ashe,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 2016-01615 Filed: 1/26/2016 8:45 am; Publication Date: 1/27/2016]